Rokiah bt Amat v Pembangunan Tanah dan Perumahan Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCvC)(W)-1586–08 OF 2018
MARY LIM, RHODZARIAH BUJANG AND HAS ZANAH MEHAT JJCA
28 JULY 2021

Land Law — Sale and purchase agreement — Sale and purchase of land — Transfer — Property formed part of undivided master title — Property remained registered in name of first respondent company upon subdivision of master title — Whether second respondent (vendor) failed to transfer property to purchaser pursuant to sale and purchase agreement — Whether vendor breached sale and purchase agreement — Whether first respondent company held property in trust for purchaser — Whether purchaser's claim against first respondent company sustainable on ground of privity — Whether purchaser's claim time barred

In 1967, the appellant's late mother, Asiah entered into a sale and purchase agreement ('SPA') with the second respondent who together with Syed Jaffar bin Alwee, Syed Yahya bin Junid and Tengku Othman bin Abdullah for the purchase of a piece of land ('said property') for the sum of RM2,450. Aisah then built a house upon the said property for about RM200,000. Asiah and her family had occupied the said property ever since. Sometime in 2015, Asiah upon a search at the land office, Asiah discovered that the property was still registered in the first respondent's name. The second respondent was a director in the first respondent company. Asiah sued the respondents claiming that the second respondent was in breach of the SPA, and further held the said property as bare trustees following her full payment of the purchase price and that there had been a breach of that trust. It was also asserted that the first respondent was not a bona fide purchaser for value and that the first respondent had assumed title subject to her rights and interests, both beneficial and equitable. There were also allegations of fraud and misrepresentation that would defeat the respondents' title under s 340 of the National Land Code. The first respondent denied all obligations and knowledge of the SPA, claiming that there was no agreement between the parties; that its title to the property was indefeasible; that it only sought a copy of the SPA and had never acknowledged the appellant's rights or interests. The second respondent also disputed the existence and validity of the SPA, contending that at the material time of agreement, the property did not exist as the master title had yet to be subdivided or individual titles issued. When the master title was issued, it was issued directly to Kheng Hup Co Ltd who in turn transferred it to the first respondent. Individual titles were only issued later and it was only then, around

that the property was issued directly in the name of the first respondent. Consequently, the second respondent could not be in breach of the SPA, especially cl 4. The existence of a bare trust was also denied with the second respondent contending that the other signatories to the SPA ought to have been sued. The High Court judge ('HCJ') had dismissed Asiah's claim on the grounds, inter alia: (a) whether there was inconsistency between the intitulement in the writ and the statement of claim; (b) the claim unenforceable against the first respondent on grounds of want of privity, that the first respondent was not a party to the SPA in which case the SPA was 'null and void' and ineffective as against the first respondent; (c) the second respondent was never the registered owner of the said property at the time of the SPA, that being so, no trust could arise; and (d) the claim time-barred. Hence, the present appeal.

Held, allowing appeal with costs:

(1) The ex parte application made by the appellant to substitute or to take over the proceedings from Asiah was entirely due to the demise of Asiah. The application (encl 75) was made pursuant to O 15 r 7(1) of the Rules of Court 2012 and it was allowed by the senior assistant registrar. That said order remained valid and effective as the respondents withdrew their application to set aside the said order. The perceived inconsistency between the intitutlement and the statement of claim was unfounded. Because the application was simply to substitute and allow someone to step into the deceased party's litigation shoes, and in this case, the unabated cause of action rightly devolved to Asiah's estate, the statement of claim necessarily maintained the claims of the deceased. Thus, the appellant clearly had locus standi; more so when she was undeniably Asiah's daughter and she had obtained the necessary papers to continue the action on her late mother's behalf; or for the estate of Asiah. The High Court was thus plainly in error in finding that there were inconsistencies between the pleadings (see paras 27 & 31).

(2) There was certainty as to the subject matter of the agreement and all the other elements for a formation of a valid agreement were fulfilled. The parties, especially the second respondent and Asiah were in no doubt as to the intent of their agreement and more particularly, as to what was being sold, that was, the said property as identified in the layout attached to the SPA. The details and the fact that the said property had yet to be excised from the master title, regardless who owned it at the material time, were all recognised at the time of agreement. The fact that the SPA was signed by one Syed Ali under power of attorney did not seem to be of any concern to anyone; least of all, the respondents who actually admit to the existence of the SPA. Whether the second respondent was selling as an agent or for anyone's behalf or that Syed Ali signed under power of attorney was irrelevant and had no effect on the validity of the SPA. The

second respondent was not absolved from liability as a contracting party under the SPA, and his breach of cl 4 was clearly proved on the balance of probabilities (see paras 48–49).

(3) The SPA recognised that there was as yet title to be issued or properly deduced, and so the second respondent agreed that when title was finally issued, especially individual title, he would ensure that such title was issued to Asiah at his/vendors' expense and efforts. In this regard, it was evidently clear that the second respondent had indeed failed to see to his obligation of ensuring that individual title was issued to Asiah. It was in this respect that the second respondent was in breach of the SPA. The HCJ failed to appreciate that this was what Asiah and thereby the appellant's claim was about. The HCJ did not even address his mind to this elementary fact and this was regrettable as it was fundamental to the claim. Again, had this been done, it could be concluded that the claim was clearly proved against the second respondent (see paras 52–54).

(4) The acknowledgement, both tacit and overt of the first respondent, and in particular, the correspondence exchanged between solicitors acting for the respective parties at the material time more than sufficiently indicate the ratification, acceptance and acknowledgment of the SPA and the obligations of the second respondent as those of the first respondent. Since the first respondent was registered as owner of the said property under these circumstances, it was plain that it held the said property in trust for Asiah who had paid in full for such purchase and the first respondent was obliged to fulfil the terms of the SPA and ensure that title was issued to Asiah, especially since the purchase price had long been settled in full. However, the HCJ had rejected the claim under bare trustee/constructive trust on the ground that it was not pleaded. Having perused the statement of claim, it was clear that there was indeed an allude to that plea. The finding of the HCJ was thus plainly in error (see paras 59–60).

(5) Asiah's entitlement to the said property was reflected in her entry and possession of the said property, built upon it and stayed at the said property from the time of the SPA till to date. The second respondent and for that matter, neither the first respondent or even Kheng Hup Co Ltd ever sought to displace, evict or challenge Asiah/appellant's right to be on the said property. In the circumstances, the first respondent was clearly in breach of the trust when it failed to ensure that individual title was issued to Asiah. On the limitation point, the court was also not in agreement with the High Court. Since the breach of cl 4 of the SPA occurred when individual title was issued to the first respondent instead of to Asiah, it was at that point that the breach occurred and the cause of

action accrued. Asiah's claim was filed in April 2015, clearly within the 12-year limitation period. The HCJ was thus also in error in this respect (see paras 62 & 64–65).

[Bahasa Malaysia summary

Pada tahun 1967, arwah ibu perayu, Asiah telah memasuki perjanjian jual beli ('PJB')dengan responden kedua yang bersama-sama Syed Jaffar bin Alwee, Syed Yahya bin Junid dan Tengku Othman bin Abdullah untuk membeli sekeping tanah ('hartanah tersebut') dalam jumlah RM2,450. Aisah kemudian membina sebuah rumah di atas harta tersebut dengan harga kira-kira RM200,000. Asiah dan keluarganya telah menduduki hartanah tersebut sejak itu. Pada tahun 2015, Asiah selepas membuat carian di pejabat tanah, Asiah mendapati hartanah tersebut masih didaftarkan atas nama responden pertama. Responden kedua merupakan pengarah di syarikat responden pertama. Asiah menyaman responden dengan mendakwa bahawa responden kedua melanggar PJB, dan seterusnya memegang harta tersebut sebagai pemegang amanah biasa berikutan pembayaran penuh harga beliannya dan telah berlaku pecah amanah. Ia juga ditegaskan bahawa responden pertama bukanlah pembeli suci hati dengan nilai dan responden pertama telah mengambil alih hak milik tertakluk kepada hak dan kepentingannya, kedua-duanya berfaedah dan saksama. Terdapat juga dakwaan penipuan dan salah nyata yang akan mengalahkan hak milik responden di bawah s 340 Kanun Tanah Negara. Responden pertama menafikan kesemua kewajipan dan pengetahuan PJB, dengan mendakwa bahawa tiada perjanjian antara pihak; bahawa hak miliknya kepada harta tersebut tidak boleh disangkal; bahawa ia hanya meminta salinan PJB dan tidak pernah mengakui hak atau kepentingan perayu. Responden kedua juga mempertikaikan kewujudan dan kesahihan PJB, dengan alasan bahawa pada masa perjanjian material, harta itu tidak wujud kerana hak milik induk masih belum dipecah bahagi atau hak milik individu dikeluarkan. Apabila hak milik induk dikeluarkan, ia dikeluarkan terus kepada Kheng Hup Co Ltd yang seterusnya memindahkannya kepada responden pertama. Hakmilik individu hanya dikeluarkan kemudian dan barulah, sekitar hartanah tersebut dikeluarkan terus atas nama responden pertama. Akibatnya, responden kedua tidak boleh melanggar PJB, terutamanya klausa 4. Kewujudan amanah biasa juga dinafikan dengan responden kedua berpendapat bahawa penandatangan lain kepada PJB sepatutnya disaman. Hakim Mahkamah Tinggi ('HMT') telah menolak tuntutan Asiah atas alasan, antara lain, bahawa: (a) sama ada terdapat ketidakselarasan antara tajuk dalam writ dan pernyataan tuntutan; (b) tuntutan tidak boleh dikuatkuasakan terhadap responden pertama atas alasan ketiadaan privasi, bahawa responden pertama bukanlah pihak kepada PJB yang mana PJB adalah 'batal dan tidak sah' dan tidak berkesan terhadap responden pertama; (c) responden kedua tidak pernah menjadi pemilik berdaftar hartanah tersebut pada masa PJB, oleh itu, tiada amanah boleh timbul; dan (d) tuntutan dihalang masa. Oleh itu, rayuan semasa.

Diputuskan, membenarkan rayuan dengan kos:

(1) Permohonan ex parte yang dibuat oleh perayu untuk menggantikan atau mengambil alih prosiding daripada Asiah adalah sepenuhnya disebabkan oleh kematian Asiah. Permohonan (lampiran 75) dibuat menurut A 15 k 7(1) Kaedah-Kaedah Mahkamah 2012 dan ia dibenarkan oleh penolong kanan pendaftar. Perintah tersebut kekal sah dan berkesan apabila responden menarik balik permohonan mereka untuk mengenepikan perintah tersebut. Ketidakselarasan yang dinyatakan antara tajuk dan pernyataan tuntutan adalah tidak berasas. Ia kerana permohonan tersebut adalah semata-mata untuk menggantikan dan membenarkan seseorang menggantikakn hak litigasi si mati, dan dalam kes ini, kausa adalah bersandarkan kepada harta pusaka Asiah, pernyataan tuntutan semestinya mengekalkan tuntutan si mati. Oleh itu, perayu jelas mempunyai locus standi; lebih-lebih lagi apabila beliau tidak dinafikan adalah anak perempuan Asiah dan beliau telah memperolehi kertas yang diperlukan untuk meneruskan tindakan bagi pihak arwah ibunya; atau untuk harta pusaka Asiah. Oleh itu, Mahkamah Tinggi secara jelas terkhilaf apabila mendapati terdapat percanggahan antara pliding (lihat perenggan 27 & 31).

(2) Terdapat kepastian mengenai perkara utama perjanjian dan semua elemen lain untuk pembentukan perjanjian yang sah telah dipenuhi. Pihak-pihak, terutamanya responden kedua dan Asiah tidak ragu-ragu tentang niat perjanjian mereka dan lebih khusus lagi, mengenai apa yang dijual, iaitu hartanah tersebut seperti yang dikenal pasti dalam susun atur yang dilampirkan pada PJB. Butiran dan fakta bahawa hartanah tersebut masih belum dikeluarkan daripada hakmilik induk, tanpa mengira siapa yang memilikinya pada masa material, semuanya diiktiraf pada masa perjanjian. Fakta bahawa PJB ditandatangani oleh seorang Syed Ali di bawah surat kuasa wakil nampaknya tidak membimbangkan sesiapa pun; paling tidak, responden yang benar-benar mengakui kewujudan PJB. Sama ada responden kedua menjual sebagai ejen atau bagi pihak sesiapa atau Syed Ali yang ditandatangani di bawah surat kuasa wakil adalah tidak relevan dan tidak mempunyai kesan ke atas kesahihan PJB. Responden kedua tidak dibebaskan daripada liabiliti sebagai pihak yang berkontrak di bawah PJB, dan pelanggaran klausa 4 jelas terbukti pada imbangan kebarangkalian (lihat perenggan 48–49).

(3) PJB mengiktiraf bahawa masih ada hakmilik yang perlu dikeluarkan atau disimpulkan dengan betul, maka responden kedua bersetuju bahawa apabila hakmilik akhirnya dikeluarkan, terutamanya hak milik individu, beliau akan memastikan bahawa hak milik tersebut dikeluarkan kepada Asiah terhadap perbelanjaan dan usaha penjualnya. Dalam hal ini, jelas sekali bahawa responden kedua sememangnya gagal memenuhi tanggungjawabnya untuk memastikan hak milik individu dikeluarkan

kepada Asiah. Dalam hal ini, responden kedua telah melanggar PJB. HMT gagal mengambilkira bahawa ini adalah maksud Asiah dan dengan itu tuntutan perayu. HMT langsung tidak memikirkan fakta asas ini dan ini amat dikesali kerana ia adalah asas kepada tuntutan tersebut. Sekali lagi, sekiranya ini dilakukan, boleh disimpulkan bahawa tuntutan tersebut telah dibuktikan dengan jelas terhadap responden kedua (lihat perenggan 52–54).

(4) Pengakuan, secara tersirat dan nyata oleh responden pertama, dan khususnya, surat-menyurat yang ditukar antara peguam cara yang bertindak untuk pihak masing-masing pada masa yang material lebih daripada cukup menunjukkan ratifikasi, penerimaan dan pengakuan PJB dan tanggungjawab responden kedua sepertimana responden pertama. Memandangkan responden pertama telah didaftarkan sebagai pemilik harta tersebut di bawah keadaan ini, adalah jelas bahawa ia memegang harta tersebut sebagai amanah untuk Asiah yang telah membayar penuh untuk pembelian tersebut dan responden pertama bertanggungjawab untuk memenuhi syarat-syarat PJB dan memastikan hak milik dikeluarkan kepada Asiah, terutamanya memandangkan harga belian telah lama dijelaskan sepenuhnya. Walau bagaimanapun, HMT telah menolak tuntutan di bawah pemegang amanah biasa/konstruktif atas alasan ia tidak diplidkan. Setelah meneliti pernyataan tuntutan, adalah jelas bahawa memang terdapat kiasan kepada pernyataan tersebut. Dapatan HMT dengan itu jelas salah (lihat perenggan 59–60).

(5) Hak Asiah ke atas harta tersebut ditunjukkan dalam kemasukan dan pemilikan harta tersebut, dibina di atasnya dan tinggal di harta tersebut dari masa PJB sehingga kini. Responden kedua dan dalam perkara itu, responden pertama mahupun Kheng Hup Co Ltd tidak pernah berusaha untuk menggantikan, mengusir atau mencabar hak Asiah/perayu untuk berada di atas hartanah tersebut. Dalam keadaan itu, responden pertama jelas melanggar amanah apabila ia gagal memastikan hak milik individu dikeluarkan kepada Asiah. Mengenai perkara had masa, mahkamah juga tidak bersetuju dengan Mahkamah Tinggi. Memandangkan pelanggaran klausa 4 PJB berlaku apabila hak milik individu dikeluarkan kepada responden pertama dan bukannya Asiah, pada ketika itu pelanggaran tersebut berlaku dan kausa tindakan terakru. Tuntutan Asiah telah difailkan pada April 2015, jelas dalam tempoh had masa 12 tahun. Oleh itu HMT juga terkhilaf dalam hal ini (lihat perenggan 62 & 64–65).]

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] 7 CLJ 271, FC (refd)

A *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822, CA (distd)
Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors [2005] 6 MLJ 120, CA (distd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
B *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)

Legislation referred to

National Land Code s 340
C Rules of Court 2012 O 15 r 7(1)

Appeal from: Civil Suit No 22NCvC-47–04 of 2015 (High Court, Johor Bahru)

Mohd Fairuz bin Abdullah (Mohd Najid & Partners) for the appellant.
D *Wong Yen Chnan (Han & Partners); Mohd Hanafi bin Basri (Malaysian Department of Insolvency) for the first respondent.*
Yong How Kiat (HK Yong) for the second respondent.

E **Mary Lim JCA (delivering judgment of the court):**

[1] The appellant's late mother, Asiah bt Yahya (Asiah) purchased the property where the family resides from the second respondent and three others way back in 1967 for RM2,450. The second respondent and three others sold
F the property using a power of attorney. At the material time of purchase, the property was part of an undivided master title. Despite having paid the purchase price in full and more, and despite having constructed the family home on the said property, the property was registered in the first respondent's name on 20 November 2008 when individual titles were issued. Asiah sued the
G respondents seeking to revoke the transfer and registration and to have the property registered in her name. The appellant's claim was dismissed. The appellant appealed.

[2] Partway through the hearing of this appeal, the first respondent was
H wound-up. The hearing was then adjourned to enable the appellant to procure the necessary leave of the winding up court to carry on with this appeal. While action in this regard was pending, the Covid-19 pandemic struck. Leave has since been granted and this is our decision.

I **[3]** Upon hearing full submissions from the respective parties, we reserved our decision. On the day of decision, the appellant filed an application in encl 51 to introduce broadly three fresh pieces of evidence in the form of cause papers in another set of court proceedings relating to the removal of caveat entered by the appellant. This application was triggered by a poser from this

court on the status of the land. Upon hearing submissions, the application in encl 51 was allowed with no order as to costs.

[4] The parties further addressed us on the effect of the fresh evidence, in particular in respect of the reliefs sought. The appellant decided to press only with reliefs in para 23(1) and (2). This decision takes those submissions into account.

[5] Amongst the fresh evidence introduced is the search conducted at the Land Registry tending to show that the first respondent had sold the property in question together with 22 other lots to a company known as Q Development Sdn Bhd vide sale and purchase agreement dated 9 April 2018. Q Development Sdn Bhd was subsequently registered as the new owner on 14 May 2018. The decision of the High Court dismissing the appellant's claim was made on 16 July 2018. The sale to Q Development Sdn Bhd does not appear to have been brought to the attention of the High Court then. In view of the current status of the property, the appellant pressed this court only for the reliefs in para 23(1) and (2) in the event her appeal is allowed.

FACTS OF THE CLAIM

[6] As indicated at the outset, the appellant's late mother, Asiah entered into a sale and purchase agreement dated 8 October 1967 with the second respondent who together with Syed Jaffar bin Alwee, Syed Yahya bin Junid and Tengku Othman bin Abdullah agreed to sell property namely Grant 316246 Lot 29357 (Lot Private 452) then held under Lot 4648 CT No 17421 ('said property') for the sum of RM2,450 ('SPA'). Pursuant to cl 5 of the SPA, Asiah, as the purchaser was allowed immediate possession of the said property upon execution of the SPA.

[7] And, that was precisely what Asiah did; she entered into possession built a permanent structure, a house upon the said property for about RM200,000 and she and the family has occupied the said property ever since. Asiah has also been paying the rates as imposed by the local authority.

[8] In 2010, through solicitors, the appellant's late mother inquired with the respondents about title to her said property. There was no response. Sometime in 2015, Asiah decided to do a search with the Land Office. The results yielded that title to the property was registered in the first respondent's name on 20 November 2008. The second respondent is a director in the first respondent company.

[9] Asiah sued the respondents claiming that the second respondent was in breach of the SPA, and further held the said property as bare trustees following

her full payment of the purchase price and that there had been a breach of that trust. It was also asserted that the first respondent is not a bona fide purchaser for value and that the first respondent had assumed title subject to her rights and interests, both beneficial and equitable. There were also allegations of fraud and misrepresentation that would defeat the respondents' title under s 340 of the National Land Code. In essence, Asiah asserted that the first respondent was aware of her presence on the said property, and that the first respondent was fully aware of the SPA or the circumstances of her purchase.

[10] Asiah sought several declaratory reliefs to the effect that the respondents hold the property as trustees and ultimately that the property should be transferred to her name. In short, Asiah was seeking to compel the respondents complete the SPA.

[11] These were the principal defences apart from limitation that was relied on by both respondents. Both respondents claimed that the claim was time-barred under the Limitation Act 1953.

[12] The first respondent denied all obligations and knowledge of the SPA, claiming that there was no agreement between the parties; that its title to the property was indefeasible; that it only sought a copy of the SPA and had never acknowledged the appellant's rights or interests.

[13] As for the second respondent, he too disputed the existence and validity of the SPA, contending that at the material time of agreement, the property did not exist as the master title had yet to be subdivided or individual titles issued. When the master title was issued, it was issued directly to Kheng Hup Co Ltd who in turn transferred it to the first respondent on 18 May 1986. Individual titles were only issued later and it was only then, around 29 March 2000 that the property was issued directly in the name of the first respondent. Consequently, the second respondent could not be in breach of the SPA, especially cl 4. The existence of a bare trust was also denied with the second respondent contending that the other signatories to the SPA ought to have been sued.

AT THE HIGH COURT

[14] Asiah's claim was filed on 7 April 2015. On 8 July 2016, before the trial began, she passed away. On 30 January 2018, the Senior Assistant Registrar allowed the appellant's application made pursuant to O 15 r 7(1) of the Rules of Court 2012.

[15] On the first day of trial, 4 February 2018, the respondents raised a preliminary objection on the order of 30 January 2018. Following the court's

directions, formal applications (encls 92 and 94) were filed seeking, inter alia, to set aside the order of 30 January 2018 and that all proceedings to date be nullified and the trial to begin afresh. The applications were heard on 29 March 2018. Meanwhile, the trial proceeded and the learned judge reserved decision on both encls 92 and 94 to 31 May 2018, the same date as the date of decision of the appellant's claim.

[16] The appellant then filed an application to amend the statement of claim — encl 102. After hearing the parties, the learned judge decided to fix 16 July 2018 for his decision on all three interlocutory applications as well as the substantive claim.

[17] On 16 July 2018, as set out at para [46] of the grounds of decision, the learned judge:

(a) dismissed the appellant's claim;

(b) struck out encls 92 and 94 without costs after the respondents withdrew their applications; and

(c) dismissed the appellant's application to amend the statement of claim vide encl 102.

[18] The appeal before us is only in relation to the dismissal of the claim.

[19] These are the reasons for the dismissal of the claim, and these reasons range from procedural to evidentiary, substantive terms of the agreement and even in the matter of reliefs.

[20] Procedurally, the learned judge found there was a 'radical departure' of the appellant's case from that which was pleaded and that there was no valid cause of action against the two respondents. In the learned judge's view, the intitulement reflected that the 'plaintif dalam kes ini telah dipinda daripada Asiah bt Yahya kepada anaknya Rokiah bt Amat (mendakwa sebagai wakil diri kepada estet Asiah bt Yahya yang telah meninggal dunia pada 8 July 2016) melalui perintah mahkamah bertarikh 30 January 2018'. However, the 'plaintiff' failed to amend the pleadings when the court dismissed the application in encl 102. Consequently, the learned judge found that the writ differed from the statement of claim and was in conflict with each other. In the learned judge's words, 'plaintiff dalam kes ini adalah Rokiah bt Amat sedangkan butiran-butiran yang merujuk kepada plaintif adalah merujuk kepada plaintif yang asal iaitu Asiah bt Yahya'. By way of an illustration, the learned judge pointed out at para [59] that the SPA was not signed by the appellant but by Asiah.

[21] The High Court further found the claim unenforceable against the first respondent on grounds of want of privity, that the first respondent was not a party to the SPA in which case the SPA is 'null and void' and ineffective as against the first respondent. The master title also revealed that the first respondent procured title from Kheng Hup Co Ltd on 18 May 1968 and upon subdivision in 2000, Lot 29357 was issued directly to the first respondent and pursuant to s 340 of the National Land Code, the first respondent's title to the property was indefeasible. This meant that the second respondent was never the registered owner of Lot 29357 at the time of the SPA on 8 October 1967. That being so, no trust could arise.

[22] At para [75], the learned judge held that the sellers in the SPA 'tidak layak di sisi undang-undang untuk menjual hartanah tersebut kepada Asiah bt Yahya kerana pada masa perjanjian jual beli tersebut ditandatangan Kheng Hup adalah tuan punya kepada hartanah tersebut'. Relying on the Court of Appeal decisions of *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822 and *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120, the High Court held that the second respondent was not capable of giving a better title than what he had — *nemo dat quod non habet*, that since the second respondent had no power in respect of or any interest in the land, he was incapable of passing any to the appellant.

[23] The High Court was also of the view that the full payment of the purchase price for the property was immaterial because the first respondent obtained the master title to the lands which included the property, directly from Kheng Hup Co Ltd. The appellant had failed to produce evidence tending to show that that transfer was facilitated by or was through the use of the purchase money, whether from the second defendant or the appellant's late mother and as such there was no trust, let alone breach of trust and/or fraud see paras [84] and [91].

[24] At para [92], the learned judge found the SPA to be a conditional agreement and that since the appellant had not led evidence to show that the conditions precedent had been fulfilled, the order of specific performance cannot be ordered. At para [94], the High Court found that the appellant had failed to prove that an irrevocable power of attorney and a deed of assignment had been prepared and signed by the parties in accordance with cl 4 of the SPA. The learned judge added that the appellant had also failed to prove that payment in full had been made, that the receipts issued were not of the first respondent.

[25] The High Court further found the claim time-barred.

DECISION

[26] Let me deal first with the procedural aspects of the claim; whether there was inconsistency between the intitulement in the writ and the statement of claim following the application to substitute allowed by the court on 30 January 2018; and whether the appellant has locus standi.

[27] The ex parte application made by the appellant to substitute or to take over the proceedings from Asiah was entirely due to the demise of Asiah. The application (encl 75) was made pursuant to O 5 r 7(1) of the Rules of Court 2012 and it was allowed by the learned senior assistant registrar. That order of 30 January 2018 remains valid and effective as the respondents withdrew their application to set aside the said order.

[28] Order 15 r 7(1) of the Rules of Court 2012 reads as follows:

7 Change of parties by reason of death

(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, *order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party.* An application for an order under this paragraph may be made ex parte.

(3) An order may be made under this rule for a person to be made a party to a cause or matter notwithstanding that he is already a party to it on the other side of the record, or on the same side but in a different capacity; but —

(a) if he is already a party on the other side, the order shall be treated as containing a direction that he shall cease to be a party on that other side; and

(b) if he is already a party on the same side but in another capacity, the order may contain a direction that he shall cease to be a party in that other capacity.

(4) The person on whose application an order is made under this rule shall, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party in accordance with the order, and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun.

A (5) Any application to the Court by a person served with an order made ex parte under this rule for the discharge or variation of the order shall be made within fourteen days after the service of the order on that person. (Emphasis added.)

B **[29]** It is quite clear that O 15 r 7(1) permits an amendment or substitution of a party who has passed away before the claim has come up for trial. Such an application may be made ex parte and the object of the application is to ensure that the proceedings may still proceed or carry on despite the death of the party concerned. The only condition really is that the cause of action must not have C abated with death.

[30] That is not the case here, and it is not the suggestion of any of the respondents that Asiah's cause of action abated upon her demise. And since the D respondents withdrew their respective applications to set aside the ex parte order granting the appellant the right to carry on Asiah's claim, the decision of the learned SAR, remains.

[31] The perceived inconsistency between the intitutlement and the E statement of claim is in fact unfounded. Because the application is simply to substitute and allow someone to step into the deceased party's litigation shoes, and in this case, the unabated cause of action rightly devolves to Asiah's estate, the statement of claim necessarily maintains the claims of the deceased. Thus, the appellant clearly has locus standi; more so when she is undeniably Asiah's F daughter and she has obtained the necessary papers to continue the action on her late mother's behalf; or for the estate of Asiah. The High Court was thus plainly in error in finding that there were inconsistencies between the pleadings.

G **[32]** Insofar as the substantive claims against the two respondents are concerned, I find that the High Court had not appreciated and properly evaluated Asiah's claim. Instead, what the High Court did was to evaluate the claim through the lenses of the respondents. It is Asiah's claim which must be H the forefront of the learned judge's considerations, whether she had discharged her burden on the balance of probabilities.

[33] Asiah's claim against the respondents emanates from the SPA and the subsequent conduct and holding out of the respondents.

I **[34]** I shall deal with the claim against the second respondent first. In a nutshell, Asiah's claim against him is that by virtue of the SPA dated 8 October 1967, Asiah bought the land identified as Grant 316246 Lot 29357 (Lot Private 452) Mukim Plentong, Daerah Johor, Negeri Johor Darul Takzim

which was then part of a larger lot held under Lot 4648 Certificate of Title No 17421. She fully paid over the purchase price of RM2,450. A

[35] As envisaged under cl 5 of the SPA, Asiah entered into possession and enjoyed all benefits derived therefrom including building the family home. This was in 1967 and there are photos produced in court testifying to that fact. At any rate, this is not disputed by the respondents. Since then, Asiah had been settling the quit rent and whatever dues as imposed by the local authorities and though the documents were not marked as exhibits or even addressed in the written grounds, I am of the firm view that these pieces of evidence were already properly before the court and ought to have been admitted. These pieces of evidence support the contentions of the appellant that she had been in occupation, without issue, especially from the respondents. B C

[36] Asiah's claim against the second respondent is multi-fold. D

[37] At the first level is the claim in contract, that there is a breach of cl 4 of the SPA for not ensuring that title, when issued by the relevant authorities is issued to her — see para 12 of the statement of claim at p 23 record of appeal *Jld* 1. E

[38] At the next level, she takes the position with her full payment, the vendors under the SPA, and that includes the second respondent, agreed to transfer the said property vide the first respondent's solicitors' letter dated 8 October 2010 but till to date has failed, neglected and/or refused to take such steps to complete the transfer the said property as promised — see para 13 of the statement of claim. Since she has paid fully paid the purchase price under the SPA and has entered into possession and occupation of the said property, the respondents thus hold the said property as bare trustee for her interest until the transfer and registration into her name has been completed. Clause 4 of the SPA and the trust was breached when the title, once issued, was registered in the name of the first respondent and not in her name — see paras 14–15 of the statement of claim. F G

H

[39] Asiah's further allegation is that the second respondent is privy to fraud and/or misrepresentation and this defeats the first respondent's title under s 340 of the National Land Code. The particulars relate, amongst others, to the knowledge of the SPA and her presence on the said property. This allegation does not appear to have been pursued at trial and submissions; hence will not be addressed in these grounds. I

[40] Clause 4 of the SPA reads Asiah follows:

> 4. Upon payment of the whole of the balance of the purchase price in manner aforesaid the Vendor shall execute in favour of the Purchaser/s or his/her/their nominee or nominees a proper and registrable transfer of the new document of title then issued by the Land Office in respect of the said land but in the event the new document of title shall not have been issued to the Vendors by the Government of the State of Johor in respect of the said land at the time when all the instalment have been paid by the Purchaser/s the Vendor shall in such case execute in favour of the Purchaser/s a Deed of Assignment, a irrevocable power of attorney whereby the Vendor shall transfer and assign all rights, title and interest in the said land to the Purchaser/s and also thereby the Vendor shall appoint and constitute the Purchaser their true and lawful attorney/s to deal with the said land as if he/she/they were the absolute owner/s thereof pending the issuance of a new document of title and in particular to execute and perfect a transfer of the said land and effect the registration thereof in accordance with the provisions of the National Land Code when the new document of title in respect of the said land is issued by the Government of the State of Johor.

[41] The second respondent's defence is that there is no breach of the SPA and denies the existence of any trust relationship, all for the same reasons, namely because the title was issued directly from the previous owner, Kheng Hup Co Ltd to the first respondent on 18 May 1968 without any individual titles being issued out. When individual titles were issued, the individual title for the said property was issued on 29 March 2000, directly in the first respondent's name. The titles were never issued to him. Consequently, Asiah had no cause of action against him.

[42] At para 8, the second respondent made this defence:

> 8. Perenggan-perenggan 14 dan 15 Pernyataan Tuntutan adalah dinafikan ... Selanjutnya, mahu Defendan Ke-2 atau pun pihak-pihak lain yang dinamakan di situ tidak pernah menjadi pemilik berdaftar tanah di bawah hak milik induk atau Lot 29357; dan selanjutnya, pada tarikh perjanjian jual beli dan/atau pembayaran harga belian yang dikatakan, tanah yang dipegang di bawah hak milik induk belum dipecah-sempadan (sub-divided) dan hak milik berasingan untuk Lot 29357, mahupun Geran 316246 atau pun hak milik sementara sebelum itu, tidak wujud sama sekali,

[43] It was this defence that found favour with the High Court. The High Court addressed this issue at paras [66]–[78]. Essentially, the High Court found that the master title was transferred from Kheng Hup Co Ltd on 18 May 1968; that master title (CT No 17421 Lot 4648 Mukim Plentong, Johor Bahru) was subdivided on 29 March 2000 and individual title GRN 316246 Lot 29357 HSD 301991 was issued on 20 November 2008. At no time did any of these titles described the second respondent as the registered owner, that in fact the second respondent had testified that he was not in the position to purchase the master title from Kheng Hup Co Ltd; that at the time of the SPA

on 8 October 1967, title was with Kheng Hup Co Ltd (para [74]) and title was only transferred to the first respondent on 18 May 1968. A

[44] At para [75], the High Court held that the vendors under the SPA were not entitled in law to sell because at that material time, Kheng Hup Co Ltd was the registered owner of the said property. The principle of *nemo dat quod non habet* as explained in *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822; and *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 was then applied; that the second respondent could not 'give a better title than he had; that since he was not the registered owner of the said property, he was never in a position to give the said property'. B C

[45] In my view, this analysis misses the whole point in Asiah's claim and thus the appellant's case. Asiah's claim is not about failure to pass title or passing a deficient or inadequate title. Her claim is that a term of the SPA has not been performed and that non-performance amounts to a breach of contract. It is about not completing the transaction as promised under the SPA. The claim is not about Asiah acquiring a lesser title or interest in the said property. It is about breach of a material term of the SPA which she wants enforced; and the SPA is an agreed document in Part A of the Bundle of Documents at trial. This is where I return to the remarks made earlier about the failure of the learned judge to appreciate and properly evaluate Asiah's claim. Had the learned judge done that, as a reasonable judge in similar circumstances would do, the learned judge would have found that there was a clear breach by the second respondent of cl 4. D E F

[46] Under the SPA, the second respondent together with three others described themselves as 'vendors' who are 'entitled to all that piece of land ('the Estate') situated in the Mukim of Plentong in the District of Johore Bahru in the State of Johore containing the approximate area of 160 acres 0 rood 20 poles which said land known as Lot No 4648 is comprised in and held under State of Johore Certificate of Title No 17321 which said estate shall hereafter be known as 'Taman Saujana". The preamble of the SPA goes further to add that the 'sub-division of the estate in accordance with the layout as shown in the vendor's estate plan (a copy whereof is annexed hereto) has been approved in principle by the State Planning Officer Johore'. G H

[47] There is no reference to the second respondent selling the said property as registered proprietor or that he is entitled to such status. Instead, all that it represents is that the second respondent is entitled to all that piece of land which ultimately forms Taman Saujana. It is that entitlement that the second I

respondent sold to Asiah for RM2,450 which was fully paid. The fact of payment and its receipt by the second respondent as stated in cl 2 of the SPA is also not in dispute.

[48] There is certainty as to the subject matter of the agreement and all the other elements for a formation of a valid agreement are fulfilled. The object and consideration of the SPA are not wanting nor is there even a suggestion that it is invalid against public policy, which is far from being the case. The parties, especially the second respondent and Asiah were in no doubt as to the intent of their agreement and more particularly, as to what was being sold, that is, the said property as identified in the layout attached to the SPA. The details and the fact that the said property had yet to be excised from the master title, regardless who owned it at the material time, were all recognised at the time of agreement; hence cll 3 and 4 of the SPA. Most importantly, the second respondent never denied the SPA. His oral testimony in court attests to that. On the contrary his evidence is in full support of the Asiah's claim, but this was not taken into consideration at all by the High Court.

[49] In his evidence-in-chief, the second respondent testified that he entered into the SPA upon the instruction of the first respondent to sell the said property to Asiah. The fact that the SPA was signed by one Syed Ali under power of attorney does not seem to be of any concern to anyone; least of all, the respondents who actually admit to the existence of the SPA but challenged it for the reasons as described above. In my view, that is rightly so. Whether the second respondent was selling as an agent or for anyone's behalf or that Syed Ali signed under power of attorney is irrelevant and has no effect on the validity of the SPA. The second respondent is not absolved from liability as a contracting party under the SPA, and his breach of cl 4 is clearly proved on the balance of probabilities.

[50] The matter of who the registered owner is at the time of the sale is immaterial or even the fact that the second respondent never became the registered owner of the said property too, is also immaterial. How the said property was described in relation to the master title or the estate also does not diminish the validity of the SPA as it is certain and plain what the subject matter of the sale was and is; similarly, the intent of the parties.

[51] This is because the SPA is not a sale by a party or person holding out that it is selling in such capacity and seeking to transfer such title or ownership. The SPA is clear in stipulating that the second respondent is entitled to the estate (Taman Saujana) and the second respondent's obligations under the SPA is in relation to individual title in Asiah's name.

[52] However, the SPA recognised that there is as yet title to be issued or properly deduced (see cl 3), and so the second respondent agreed that when title is finally issued, especially individual title, he will ensure that such title is issued to Asiah at his/vendors' expense and efforts — see cl 4.

[53] In this regard, it is evidently clear that the second respondent has indeed failed to see to his obligation of ensuring that individual title is issued to Asiah. When the individual title to the said property was issued on 20 November 2008, it was in the first respondent's name, contrary to what was agreed upon in the SPA. Recognising that breach, the second respondent in fact took steps towards ensuring that it be transferred to Asiah, after she had paid for survey and the like. Yet, despite Asiah making such further payments, the title was not issued to her.

[54] It is in this respect that the second respondent is in breach of the SPA. The learned judge failed to appreciate that this was what Asiah and thereby the appellant's claim was about. Actually, the learned judge did not even address his mind to this elementary fact and this is regrettable as it was fundamental to the claim. Again, had this been done as the learned judge was obliged to, a similarly circumstanced court would reasonably have concluded that the claim was clearly proved against the second respondent.

[55] The factual matrix in the instant appeal is different from *Ngan & Ngan Holdings* and *Subramaniam a/l NS Dhurai* where it was the sufficiency of title that was under scrutiny; that what was transferred was less than what was promised. As pointed out, that is not the nature of the claim nor were those the facts.

[56] Since there is certainty in the subject matter of the SPA, that it is the second respondent's interests or entitlement to the said property as defined and delineated in the layout plan attached to the SPA (in any case not in dispute save for the argument that formal title had not been issued), the second respondent holds his entitlement to the estate in relation to the said property in trust for Asiah. Following *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; and *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193; and *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 7 CLJ 271, Asiah acquired beneficial interest in the said property when she fully paid for the said property while the second respondent holds the said property in trust for her.

[57] This is further reason why the learned judge was plainly wrong in dismissing the claim against the second respondent.

[58] The second respondent admitted to the existence of the SPA and his obligations at the trial, claiming that he acted at all times on behalf of the first respondent. The second respondent was a director of the first respondent. While that may only be from 2008 to 2014, the evidence clearly showed that Asiah frequently approached him together with the appellant to inquire about title to the said property.

[59] The acknowledgement, both tacit and overt of the first respondent, and in particular, the correspondence exchanged between solicitors acting for the respective parties at the material time more than sufficiently indicate the ratification, acceptance and acknowledgment of the SPA and the obligations of the second respondent as those of the first respondent. Since the first respondent was registered as owner of the said property under these circumstances, it is plain that it holds the said property in trust for Asiah who had paid in full for such purchase and the first respondent is obliged to fulfil the terms of the SPA and ensure that title is issued to Asiah, especially since the purchase price had long been settled in full.

[60] The learned judge had rejected the claim under bare trustee/constructive trust on the ground that it was not pleaded. Having perused the statement of claim, it is clear that paras 13–14 in particular allude to that plea. The finding of the learned judge is thus plainly in error.

[61] The first respondent who was represented by Lee Ban Heng, gave evidence which were not in the least helpful. He bought shares in the first respondent for over RM10m but was unable to tell from whom he had bought the shares. He was unable to tell whether the shares were from Syed Ali or any of the vendors of the SPA, including the second respondent. In fact, he did not even know the second respondent. His testimony consisted of denials, no knowledge or lack of awareness on various critical matters including letters written by its solicitors.

[62] Asiah's entitlement to the said property is reflected in her entry and possession of the said property, built upon it and stayed at the said property from the time of the SPA till to date. The second respondent and for that matter, neither the first respondent or even Kheng Hup Co Ltd ever sought to displace, evict or challenge Asiah/appellant's right to be on the said property.

[63] In the circumstances, the first respondent was clearly in breach of the trust when it failed to ensure that individual title was issued to Asiah.

[64] On the limitation point, I am also not in agreement with the High Court. Since the breach of cl 4 of the SPA occurred when individual title was issued to the first respondent instead of to Asiah, it is at that point that the

breach occurred and the cause of action accrued. Asiah's claim was filed in April 2015, clearly within the 12-year limitation period. The learned judge was thus also in error in this respect.

CONCLUSION

[65] For the reasons stated above, I agree with the submissions of learned counsel for the appellant and I would allow the appeal, set aside the decision and order of the High Court and grant the orders as prayed for in para 23[1] and [2] together with costs of RM25,000 from each respondent subject to allocator.

[66] For clarity, the orders granted to the plaintiff as referred to at para 23[1] of the statement of claim shall refer to Asiah bt Yahya.

[67] Finally, I have not made an order for damages since the primary relief is to complete the SPA and with the fresh evidence allowed. There is however incontrovertible evidence led by PW1, the land valuer who assessed the value of the said property to be around RM270,000. An appropriate amount of damages in the sum of RM300,000 together with interest at 5%pa from the date of the High Court decision to the date of realisation would otherwise have been ordered.

[68] My learned sister Has Zanah bt Mehat JCA has read the draft of these grounds and have agreed with the grounds.

Appeal allowed with costs.

Reported by K Selvaraj